

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

2004

After Grutter v. Bollinger-- Revisiting the Desegregation Era from the Perspective of the Post- Desegregation Era

Kevin D. Brown

Indiana University Maurer School of Law, brownkd@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Education Law Commons](#)

Recommended Citation

Brown, Kevin D., "After Grutter v. Bollinger-- Revisiting the Desegregation Era from the Perspective of the Post-Desegregation Era" (2004). *Articles by Maurer Faculty*. Paper 212.
<http://www.repository.law.indiana.edu/facpub/212>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

AFTER *GRUTTER v. BOLLINGER*— REVISITING THE DESEGREGATION ERA FROM THE PERSPECTIVE OF THE POST- DESEGREGATION ERA

*Kevin D. Brown**

In what Justice Scalia called the Supreme Court's "split double header"¹ in the summer of 2003, the Court upheld the affirmative action plan adopted by the University of Michigan Law School in *Grutter v. Bollinger*,² but rejected the plan adopted by the University of Michigan's College of Literature, Science and Arts in *Gratz v. Bollinger*.³ With these opinions, the Supreme Court has resolved one of the last major issues hanging over from the Desegregation Era of American society. The beginning of the Desegregation Era can be said to have started with the unanimous 1954 Supreme Court opinion in *Brown v. Board of Education*. With subsequent decisions, the Court justified the liberal use of racial classifications to remedy the harms inflicted by discriminatory practices of the past.⁴

Over the past thirty years, however, the Court has been constraining the ability to use racially conscious governmental policies and practices to remedy the current effects of America's racial history. In the 1970s, for example, the Court restricted the use of racial classifications by government to remedy past discrimination by deciding that violations of the equal protection

* Charles A. Whistler Professor of Law and the Director of the Hudson & Holland Scholars Program, Indiana University-Bloomington, B.S. 1978, Indiana University; J.D. 1982, Yale Law School. An early version of this comment was delivered as the 2004 Martin Luther King Jr. Law School Lecture at the Vanderbilt Law School in Nashville, Tennessee on January 22, 2004 and at Purdue University in West Lafayette, Indiana on February 5, 2004. The author would like to thank Vivek Boray, Sylvia Biers, Carmen Brun, Robyn Carr and Scott Timberman for the helpful research on this comment.

1. *Grutter v. Bollinger*, 539 U.S. 306, 348 (Scalia, J., concurring in part and dissenting in part).

2. 539 U.S. 306 (2003).

3. 539 U.S. 244 (2003).

4. See, e.g., *Green v. County Sch. Bd. of New Kent*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 13 (1971).

clause are only triggered by governmental actions motivated by discriminatory intent, not discriminatory effect.⁵ The Supreme Court generally prohibited the implementation of cross-district school desegregation remedies in its 1974 *Milliken v. Bradley*⁶ decision. The effect of this decision was to severely restrict the use of racial classifications to eliminate segregation in America's public schools. In the 1990s the Court rendered three opinions providing for the termination of school desegregation decrees.⁷ In addition, the Court has rendered several opinions rejecting the use of racial classifications to foster awarding governmental contracts to minority companies,⁸ maintaining the percentage of black school teachers to act as role models for black students,⁹ and striking down the use of racial classifications of prospective voters in order to ensure the creation of congressional majority-minority legislative districts.¹⁰ Thus, it is clear that with the dawn of the Twenty-First Century, the equal protection treatment of racial and ethnic conflicts has firmly moved into a Post-Desegregation phase.

In light of the Supreme Court's opinion in *Grutter*, which embraces the educational and other benefits that can be derived from exposing people to different perspectives and points of view, this comment will revisit Reverend (Dr.) Martin Luther King, Jr.'s *I Have A Dream Speech* delivered on the steps of the Lincoln Memorial on August 29, 1963. To the extent that there is one speech or one vision that captured what the time period known as the "Desegregation Era" was about, it was the *I Have a Dream Speech*. Thus, a reexamination of that speech is a way in which to reexamine the meaning, purposes and goals of the desegregation of American society from the vantage point of the Post-Desegregation Era.

Section I will revisit the Court's decisions in *Grutter* and *Gratz*, but it will pay particular attention to Justice O'Connor's opinion for the Court in *Grutter*. It will highlight the justifications that she provided for taking account of race and ethnicity in order to achieve a critical mass of underrepresented minorities with a history of discrimination. O'Connor notes in her opinion that among the bene-

5. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

6. 418 U.S. 717 (1974).

7. See *Board of Educ. v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Missouri v. Jenkins*, 515 U.S. 70 (1995).

8. *Richmond v. Croson*, 488 U.S. 469 (1989); *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200 (1995).

9. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

10. *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995).

fits derived from the use of racial classifications is the fact that discussions are livelier more enlightening and interesting when students have the greatest possible variety of backgrounds.

Section II will then revisit Reverend (Dr.) King's *I Have A Dream Speech*. But taking its cue from Justice O'Connor's opinion about the benefits of presenting a variety of perspectives to discuss a given social phenomena, it will revisit the speech with the Post-Desegregation Awareness. The Post-Desegregation Awareness is a conscious awareness that racial or ethnic phenomena are not understood as separate isolated and unconnected incidents. In American society, the comprehension of any particular racial or ethnic phenomena, such as the *I Have A Dream Speech*, is always done against a *sub silencio* background of a much larger set of ideas about race and ethnicity and there are always many different implicit backgrounds. These *sub silencio* background sets of ideas structure and limit the various perceptions of a given racial or ethnic phenomena in alternative and irreconcilable ways. Section II will review the dream articulated by Reverend (Dr.) King in his speech, but will interpret his dream against three different background sets of ideas that generate three separate dreams—the Individualist Dream, the Nationalist Dream and the Afrocentrist Dream. By discussing Reverend (Dr.) King's speech with the Post Desegregation Awareness, the primary insight about the Desegregation Era from the perspective of the Post-Desegregation Era can be revealed—there was not one dream shared by those who fought against racial oppression during the Desegregation Era, but a number of different and incommensurable dreams.

Since there were different and incommensurable dreams dreamed by those struggling against racial oppression, there are different interpretations of how to judge the successes of the Desegregation Era. Section III will review how the Desegregation Era was understood by the three different dreams. In addition, each of the separate dreams would have a different comprehension of the Supreme Court's opinion/decision in *Grutter*. Section III will also briefly discuss *Grutter* against the background set of ideas generated by each of the three dreams.

I. COURT'S OPINION IN GRUTTER V BOLLINGER AND GRATZ V BOLLINGER

Justice O'Connor's opinion for the five-person majority of the Court in *Grutter* starts by reaffirming Powell's opinion in *Re-*

gents of the University of California v. Bakke. She notes that the “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”¹¹ Since the Fourteenth Amendment protects *persons*, not *groups*, all governmental actions based on race should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

Applying strict scrutiny, Justice O’Connor’s opinion noted the benefits of enrolling a critical mass of underrepresented minority students with a history of discrimination are substantial.¹²

[T]he Law School’s admission policy promotes “cross-racial understanding”, helps to break down racial stereotypes, and “enables students to better understand persons of different races”. These benefits are “important and laudable” because “classroom discussion is livelier, more spirited and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”¹³

O’Connor goes on to note that the need for critical mass is not premised “on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”¹⁴ Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, however, the unique experience of being a racial minority in a society where race unfortunately still matters will also effect a person’s views. O’Connor goes on to assert that the Law School’s claim of a compelling interest is further bolstered by expert studies and reports that show that student body diversity promotes learning outcomes and “better prepares students for an increasingly diverse workforce and society as well as better prepares them as professionals.”¹⁵

O’Connor then notes additional benefits that flow from diverse student bodies that are not just tied to improvements in the educational process. Major American businesses have made it clear that the skills needed in the increasingly global market-place

11. *Grutter*, 539 U.S. at 323 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978)).

12. *Id.* at 330.

13. *Id.* (quoting App. to Pet. for Cert. 244a, 246a).

14. *Id.* at 333 (quoting Brief for Respondent Bollinger et al. 30).

15. *Id.* at 330 (citing Brief of Amici Curiae, American Educational Research Association et al. 3).

can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints. Relying on the brief filed by high-ranking retired officers and civilian leaders of the military, O'Connor also notes that their decades of experience reveal that a highly qualified, racially diverse officer corps is essential for the military to fulfill its principle mission to provide national security. At present, the military simply cannot achieve the twin goals of an officer corps that is *both* highly qualified *and* racially diverse, without using limited race-conscious recruiting and admissions policies in the service academies and the ROTC. Finally, O'Connor notes that universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity,"¹⁶

With the above arguments, a majority of the justices on the Supreme Court, for the first time, recognized the tremendous educational and non-educational value derived from exposing people to the different perspectives derived from the experience of minority groups with a history of discrimination. These benefits are substantial enough to constitute a compelling state interest to justify the use of racial classifications. However, the Supreme Court also rejected the affirmative action plan presented to it in *Gratz* as not narrowly tailored because the plan did not provide for enough individualized consideration that must be the core of a race-conscious admissions policy. Thus, on one hand, the Court stressed that interpretations of the equal protection clause addressing the use by government of racial classifications are firmly based on the recognition that, absent extraordinary circumstances, government should treat people as individuals, not as members of racial or ethnic groups. But on the other hand, the Supreme Court recognized that there is tremendous educational and non-educational value flowing from ensuring admissions to selective higher educational programs, of a critical mass of students from racial and ethnic groups with a history of discrimination in this country. In other words, interpretations of

16. *Id.* at 332.

the equal protection clause are based upon a point of view centered around an abiding respect for individuality. Even though this perspective is decisive for addressing equal protection rights, it is not the only valid understanding of a given social phenomenon, including racial phenomena.

II. REVEREND (DR.) KING'S *I HAVE A DREAM* SPEECH UNDERSTOOD WITH A POST-DESEGREGATION AWARENESS

The Post-Desegregation Era is not an era based upon an effort to assimilate all to a single dominant cultural perspective. Rather, it is one that attempts to accommodate two apparently conflicting ideals. While resolving inter-racial constitutional disputes on a basis that respects individuality, central to the Post-Desegregation Era is an effort to appreciate multiple perspectives and points of views, including those of underrepresented minorities with a history of discrimination. This appreciation is viewed as beneficial for all, not just for the underrepresented minorities.¹⁷

In light of the Supreme Court's opinion in *Grutter*, this section will revisit Reverend (Dr.) Martin Luther King, Jr.'s *I Have a Dream Speech* delivered on the steps of the Lincoln Memorial on August 29, 1963. To the extent that there is one speech or one vision that captured what the time period known as the "Desegregation Era" was about, it was the *I Have a Dream Speech*. Thus, a reexamination of that speech is a way in which to reexamine the meaning, purposes and goals of the desegregation of American society from the vantage point of the Post-Desegregation Era.

Reverend (Dr.) King's *I Have A Dream* speech was a speech delivered at a time when people of African descent were called "Negroes" or "colored" out of respect, and were called "coon", "darkie" and even "black" as an insult. It was a speech delivered when neither America, nor her descendants from Africa had undergone the Civil Rights Movement, the Black Consciousness Movement, the Multicultural Movement, nor the Diversity Movement. When Latinos were still classified by their race, and not by their ethnicity. When 98.5% of Americans were classified as either black or white.¹⁸ It was a speech delivered be-

17. *Metro Broadcasting, Inc., v. F.C.C.*, 497 U.S. 547 (1990).

18. Due to this long biracial period of classifying Americans, when dealing with the interest of other racial and ethnic minority groups often the issue that hung in the background was how similar to or different from African-Americans is a given group. See e.g.,

fore the passage of the Civil Rights Act of 1964, the most sweeping piece of civil rights legislation in the country's history. When segregation and conscious racial discrimination were the explicit law of the land in many areas of the country. When discrimination based on race in employment, merchandising stores, eating establishments, places of entertainment, hotels and motels was generally accepted as a fact of life. When Negroes seldom occupied positions above the most menial levels in American businesses and corporations. Even lower level management positions were, for the most part, unobtainable. When what became known as the "glass ceiling" in the 1980s, was a firmly implanted, outright "concrete barrier." The *I Have A Dream Speech* was a speech delivered before the passage of the Voting Rights Act of 1965, which helped to secure the right to vote for most Negroes living in the South. It was a speech delivered when most Negroes in the South had been disenfranchised for the entire 20th century. When no man of color had been elected mayor of a major U.S. city in the 20th century. When there were only five Negroes serving in Congress,¹⁹ none of whom had been elected from any of the eleven states that made up the former Confederacy since 1900. The *I Have A Dream Speech* was a speech delivered when resistance to the Supreme Court's school desegregation decision in *Brown* had been so effective, that ten years after the Court's 1954 decision, only 2.2% of the black students in the eleven former states that made up the Old Confederacy attended desegregated schools.²⁰ It was a speech delivered before the Supreme Court's 1968 opinion in *Green v. County School Board of New Kent County*²¹ that placed the obligation on school systems to desegregate and to do it now, and the Supreme Court's opinion in *Swann v. Charlotte-Mecklenburg Board of Education*,²² where the Court approved busing as a means for school districts to ob-

Gong Lum v. Rice, 275 U.S. 78 (1927) (holding that the constitutional rights of a Chinese school girl was not violated by requiring her to attend the colored school as opposed to allow her to attend the white school); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198 (1973) (in concluding that Latinos should be included in desegregation remedy the Court stated "though of different origins Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students."); See also Lyndon B. Johnson, *Running Against the Twelfth Man of History*, N.Y. TIMES, Dec. 26, 1972, at L33 ("When I say 'black' I also mean 'brown' and 'yellow' and 'red' and all other people who suffer discrimination because of their color . . .").

19. DONALD C. BACON, 1 THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS, at 175 (1995).

20. See U.S. COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUALITY OF EDUCATIONAL OPPORTUNITY 46 (1975).

21. 391 U.S. 430 (1968).

22. 402 U.S. 1 (1971).

tain the greatest possible degree of actual desegregation. The *I Have A Dream Speech* was a speech delivered before mainstream colleges and universities began to take account of race and ethnicity in order to significantly increase the number of minorities on their college campuses. When only a handful of Negroes attended selective colleges and universities of this country and almost none of them taught there.

In revisiting the speech, I will focus on the primary insight about the speech—and, thus, the Desegregation Era—that becomes obvious when it is viewed with the Post-Desegregation Awareness. The primary insight is that those committed to fighting against racial oppression did not share one dream. Rather the people who heard the *I Have A Dream Speech* and shared the dream, heard different dreams and dreamed of different worlds to come. I will articulate three such different dreams by which to understand the *I Have a Dream Speech*: the Individualist Dream, the Nationalist Dream; and the Afrocentric Dream. It is important to note that each of these dreams could be shared by anyone regardless of their race or ethnicity. In addition, any given individual could believe in more than one dream, even though the dreams may be inconsistent.

A. THE NIGHTMARE COMMON TO EACH DREAM

Before I start to discuss the three different dreams, let me start by saying something about the nightmares each dream sought to end. Each of the dreams would have viewed the nightmare from which to be awakened differently, but all three dreams would have identified common aspects of the nightmare. All dreamers agreed that part of the nightmare was a government that is supposed to be of the people, by the people and for the people oppressing some of the people, even if it were for the benefit of the majority of the people. Thus, all dreamers agreed that part of the nightmare was the Tyranny of the Majority.²³

All dreamers agreed that it was wrong for government to compel white people to drink from different water fountains than colored people, use different public restrooms than colored people, enter public buildings through separate entrances than colored people, sit in separate areas in the courtrooms than colored people,²⁴ sit in different areas in public waiting rooms than

23. See generally LANI GUINIER, *TYRANNY OF THE MAJORITY* (1994).

24. *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam).

colored people,²⁵ attend separate public recreational facilities than colored people,²⁶ and send their kids to different schools than colored people.²⁷ All dreamers agreed that part of the nightmare was a government that imposed these kinds of laws.

All dreamers agreed that the following statement by an important politician of the 19th century was part of the nightmare:

That I am not, nor ever have been in favor of bringing about in any way the social and political equality of white and black races—that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office . . . and I will say in addition to this that there is a physical difference between the black and white races which I believe will for ever forbid the two races living together on terms of social and political equality. And in as much as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.²⁸

Thus, all dreamers agreed that part of the nightmare was the fact that the right to vote, to hold political office and to serve on juries depended upon the color of your skin. All dreamers agreed that a society in which publicly expressed notions of white supremacy were encouraged, was a nightmare from which to be awakened.

B. THE INDIVIDUALIST DREAM

While there was agreement regarding certain evils, there were at least three different dreams being shared by people who heard Reverend (Dr.) King's speech. There were those who heard the Dream in the broad, universalist message of individual freedom, individual liberty and individual self-determination. These Individualist Dreamers constructed their dream of the perfect world to come upon the belief in the ontological presup-

25. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (striking down segregation in transportation); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam) (striking down segregation in municipal airports).

26. See *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122 (5th Cir. 1958) (per curiam) (striking down segregation in public parks), *aff'd per curiam*, 358 U.S. 54 (1958); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (striking down segregation on golf courses); *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (striking down segregation on beaches).

27. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

28. President Abraham Lincoln, Address at Charleston (Sept. 18, 1858), in *CIVIL RIGHTS AND THE AMERICAN NEGRO* 171-72 (Albert P. Blaustein & Robert L. Zangrando, eds. 1991).

position that each individual is created with a true self that is separate, unique and distinct from all others. The Individualist Dreamers understood that while there is a manifest self present to the outside world, individuals also possess a hidden, deep and essential self. This part of the self is prior to all the manifest characteristics of the individual, including race and ethnicity.²⁹ The true self is the self that is devoid of color, race or ethnicity. This part of the self is the source of the motivations and drives that propel the individual to express opinions, hold beliefs, pursue actions and generate attachments.

The Individualist Dreamers celebrate the ability of the individual to discover his or her true self and then follow that true self's internally generated desires. The only constraint placed on these individual choices is that each individual must exercise self-restraint over their inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with others' ability to pursue their self-determined goals and objectives.

For the Individualist Dreamer, the Desegregation Era was intended to respond to the fact that American society was a society that treated people differently because of the color of their skin, and not the content of their character. For the Individualist Dreamers, the principal feature of the nightmare was the evil of the hive mind—the evil that forced the individual into the service of an involuntary group. Treating someone differently based on a characteristic that they could not control was also a part of the nightmare from which American society had to be awakened. Such treatment infringed upon the ability of the individual to pursue his or her own self-determined goals and objectives in life. Yet, conscious race discrimination violated the most fundamental principle of what the Individualist Dreamer believed life was about. For these Dreamers, what Dr. King was dreaming about was reaching a truly colorblind world. Reaching a world where people weren't white, they weren't black. They were just people. They dreamed of reaching a world where race was no more important than the color of one's eyes in an age where all had access to colored contact lens. This was a moral crusade about Simple Justice. For all are diminished when some individuals in the society are oppressed by an involuntary trait like the color of one's skin.³⁰

29. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 152 (1985); *see also* MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 1-8 (1982).

30. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (Thomas J., dissenting)

When the Individualist Dreamers heard the dream articulated by Dr. King, they associated the speech with the statement in the Declaration of Independence: "We hold these Truths to be self-evident, That All men are created equal, that they are endowed . . . with certain unalienable rights, that among them these are Life, Liberty, and the Pursuit of Happiness."³¹

For the Individualist Dreamer, special emphasis is placed upon certain passages in the *I Have A Dream Speech*. They will specifically point to King saying:

Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice [understood as individual liberty for all]. Now is the time to open the doors of opportunity to all of God's children. . .

....

... We can never be satisfied as long as a Negro in Mississippi cannot vote . . . No, no, we are not satisfied, and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream.

....

I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident: that all men are created equal." I have a dream that one day on the red hills of Georgia the sons of former slaves and the sons of former slaveowners will be able to sit down together at a table of brotherhood. I have a dream that one day even the state of Mississippi, a desert state, sweltering with the heat of injustice and oppression, will be transformed into an oasis of freedom [understood as individual liberty] and justice. I have a dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today.

....

... So let freedom [understood as individual liberty] ring from the prodigious hilltops of New Hampshire. Let freedom ring from the mighty mountains of New York. Let freedom ring from the heightening Alleghenies of Pennsylvania! Let

("every time the government places citizens on racial registers and makes race relevant to the provision of burdens and benefits, it demeans us all.").

31. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

freedom ring from the snowcapped Rockies of Colorado! Let freedom ring from the curvaceous peaks of California! But not only that; let freedom ring from Stone Mountain of Georgia! Let freedom ring from Lookout Mountain of Tennessee! Let freedom ring from every hill and every molehill of Mississippi. From every mountainside, let freedom ring.

When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last! free at last! thank God Almighty, we are free at last!"³²

C. THE NATIONALIST DREAM

But the Individualist Dreamers were not the only ones to hear Reverend (Dr.) King's dream. There were others who heard the speech in terms of a dream of building something special out of America. The Nationalist Dreamers harkened back to the dream that America was to be the Shining City on the Hill. America was to be the ultimate civilization that human kind had ever produced. The legacy that America was to leave humankind, was a society committed to "justice for all" that the world should emulate. These were the dreamers who were aware that America is the world's oldest continuing democracy. These were the dreamers who break the surly bonds of earth and send men to the moon and people to Mars, not because it is easy, but because America chooses to do so.

The Nationalist Dreamers were dreamers who proudly pledged allegiance "to the Flag of the United States of America and to the Republic for which it stands; one nation, under God, indivisible with liberty and justice for all."³³ They were the ones who, in paraphrasing the Preamble of the Constitution, would say that

We the People of the United States, In Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this [Nation].³⁴

32. Martin Luther King, "I Have a Dream" Address at Washington, D.C. (Aug. 28, 1963).

33. Pledge of allegiance to the flag, 4 U.S.C. § 4 (1998).

34. U.S. CONST. pmbl.

The Nationalist Dreamers are the people who, when they heard the *I Have A Dream Speech*, harkened back to the pledge that Abraham Lincoln made to the soldiers who died on the battlefield of Gettysburg in his address there on November 19, 1863. Where Lincoln said

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation or any nation so conceived and so dedicated can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that the nation might live. . . .

But, in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow, this ground. The brave men living and dead who struggled here have consecrated it far above our poor power to add or detract. . . . It is for us, the living, rather to be dedicated here to the unfinished work which they who fought so nobly advanced. It is for us to be here dedicated to the great task remaining before us, that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion; *that we here highly resolve that these dead shall not have died in vain; that this nation, shall have a new birth of freedom; and that the government of the people, by the people, for the people shall not perish from the earth.*³⁵

When the Nationalist Dreamers heard Reverend (Dr.) King's speech they paid particular attention to King saying

When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.

This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness. Instead of honoring this sacred obligation, America has given the Negro people a bad check which has come back marked 'insufficient funds.' But we refuse to believe that the bank of justice is

35. President Abraham Lincoln, Address at Gettysburg (Nov. 19, 1863), <http://www.loc.gov/exhibits/gadd/4403.html> (emphasis added).

bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.

....

... With this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood. With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day.

[We are committed to bringing about the] day when all of God's children will be able to sing with a new meaning, 'My country, tis of thee, sweet land of liberty, of thee I sing. Land where my fathers died, land of the pilgrim's pride, from every mountainside, let freedom ring.' And if America is to be a great nation, this must become true. . . .³⁶

D. THE AFROCENTRIC DREAM

But, in addition to the Individualist Dreamers and the Nationalist Dreamers, there were also Afrocentric Dreamers. As indicated earlier, I want to again stress the fact that while I use the term "Afrocentric Dreamers," these dreamers could be of any race, ethnicity or color. Thus, one embracing the Afrocentric Dream could be white, black, red, yellow or brown, but this is a dream that is particularly rooted in the experience of African-Americans as a people. Up until Reverend King's speech, the central historical fact of the experience of black people in America was that of a group of people who constantly encountered racial oppression. This experience of racial oppression united diverse groups of sons and daughters of the soil of Africa who were from a thousand different villages and a hundred different African ethnic groups into one people. *E Pluribus Unum* could be the motto for African-Americans, as much as it could be for all Americans.

In 1963, racial oppression met black people in every aspect of life. It met them in segregated schools. It met them in the farm field, at the factory, the office or the other place of employment, when they applied for a job, when they had a job, and when they lost a job. It met them in the market places where they bought goods or services from others or sold goods and services to others. It met them at the doctor's office, at the hospital,

36. King, *supra* note 32.

at the church, at the funeral home and in the cemetery. Racial oppression met them from the cradle to the grave.

Born out of this experience of racial oppression was a dream that had one major purpose, goal or objective—the liberation of black people from racial domination. The liberation sought was not, and is not, abstract. It is liberation from domination in the material, spiritual and psychological conditions of the lives of black people. The Afrocentric Dreamers dreamed of a day in which racial oppression in the United States would be a thing of the past and no one would be oppressed because of the color of his or her skin. Thus, these dreamers sought liberation from racial oppression. The Individualist Dream and the Nationalist Dream were paths by which to pursue their dream. But their dream was neither Individualism nor Nationalism, neither individual self-determination nor creating the Shinning City on the Hill for the world to see and emulate. Their dream was liberation of African-Americans from the racial oppression of those who had formerly, and currently, exercised dominion over them.

King was one of a long line of black prophets who preached the twin messages of the hypocrisy of American justice and the end of racial oppression. The portion of King's speech that points to the hypocrisy of America harkens back to the one delivered by Frederick Douglas on July 4, 1841. When he said:

What, to the American slave, is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is a constant victim. To him your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass-fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to him, mere bombast, fraud, deception, impiety and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages.³⁷

The portion of King's speech that points to the liberation from racial oppression points to the words that W. E. B. DuBois wrote 60 years earlier in 1903 when DuBois described the *Souls of Black Folks* by saying that:

37. Frederick Douglas, Independence Day Speech at Rochester (July 4, 1841), <http://www.freemaninstitute.com/douglass.htm>.

The black is sort of a seventh son, born with a veil and gifted with second sight in this American world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body whose dogged strength alone keeps it from being torn asunder.

The history of the American black is the history of this strife—this longing to attain self-conscious personhood, to merge this double self into a better and true self. In this merging, not to Africanize America not to bleach our black souls. But we simply wish to make it possible for a person to be both black and American, without being cursed and spit upon by our fellow countrymen and without having the doors of Opportunity closed roughly in our face.³⁸

For the Afrocentric Dreamers, when they hear Reverend King's speech, they hear King speaking of the long dark night of suffering of black people and the determination to pursue liberation from racial oppression. They pay particular attentions to passages where King said

Five score years ago, a great American, in whose symbolic shadow we stand signed the Emancipation Proclamation. This momentous decree came as a great beacon light of hope to millions of Negro slaves who had been seared in the flames of withering injustice. It came as a joyous daybreak to end the long night of captivity. But one hundred years later, we must face the tragic fact that the Negro is still not free.

One hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination. One hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity. . .

....

...It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the

38. W. E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* 16-17 (1961) (this printing contains the complete text of the original 1903 edition).

Negro people a bad check which has come back marked "insufficient funds." But we [understood as those committed to the eradication of racial oppression] refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.

....

... There are those who are asking the devotees of civil rights, "When will you be satisfied?" We [understood as those committed to the eradication of racial oppression] can never be satisfied as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities. We cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one. We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. No, no, we are not satisfied, and we will not be satisfied until justice [understood as liberation from racial oppression] rolls down like waters and righteousness like a mighty stream.

....

... So let freedom [understood as liberation from racial oppression] ring from the prodigious hilltops of New Hampshire. Let freedom ring from the mighty mountains of New York. Let freedom ring from the heightening Alleghenies of Pennsylvania! Let freedom ring from the snowcapped Rockies of Colorado! Let freedom ring from the curvaceous peaks of California! But not only that; let freedom ring from Stone Mountain of Georgia! Let freedom ring from Lookout Mountain of Tennessee! Let freedom ring from every hill and every molehill of Mississippi. From every mountainside, let freedom ring.³⁹

III. DESEGREGATION ERA AND UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES AS UNDERSTOOD BY THE DIFFERENT DREAMS

A. INDIVIDUALIST DREAM

For the Individualist Dreamer, much has been accomplished in America during the Desegregation Era. The Desegregation

39. King, *supra* note 32.

Era was about increasing individual self-determination and thereby decreasing the influence of involuntary traits and characteristics, like race or ethnicity, on a person's life choices. Race now counts for less in terms of denying people opportunity than ever before. Conscious racial discrimination in employment, merchandising stores, eating establishments, places of entertainment and hotels and motels is illegal. A number of successful and highly visible discrimination suits have been won by African-American victims of discrimination.⁴⁰ The right to vote or hold political office no longer depends upon the color of a person's skin. African-Americans like Robert Johnson and Oprah Winfrey are on the list of the wealthiest Americans. Richard Parsons, of AOL Time-Warner, and Stanley O'Neal, of Merrill Lynch, are among the African-Americans who run, or have run, some of America's most powerful corporations. Black athletes like Tiger Woods, Michael Jordan and LeBron James are among the highest paid marketing personalities in American history. And five blacks, Colin Powell, Condeleeza Rice, Rod Paige, Michael Powell, and Alphonso Jackson hold prominent positions in President Bush's administration. Since President Bush received only 8% of the African-American vote, these appointments are not *quid pro quo* for the African-American electoral support, but arguably represent the appointment of the best person for the positions.⁴¹ Americans no longer live with "white only" and "colored only" signs etched above water fountains, waiting rooms, transportation facilities, rest rooms, schools, hospitals and cemeteries, nor have they for the past 30 years. Even in contexts where it is not illegal to consciously discriminate on the basis of race, the general American ethos considers conscious racial discrimination wrong or in bad taste.⁴²

40. For example, in September 1999, Ford reached an agreement with the EEOC that was expected to cost it approximately ten million dollars to reserve claims by females alleging sexual and racial harassment. See EEOC press release, *EEOC and Ford Sign Multi-Million Dollar Settlement of Sexual Harassment Case* (Sept. 7, 1999) available at <http://www.eeoc.gov/press/9-7-99.html>. Texaco, for example, paid out \$176 million, then the largest amount ever paid in a racial discrimination suit, to settle the class action claims of over 1,400 African American employees. See BARI-ELLEN ROBERTS WITH JACK E. WHITE, *ROBERTS VS. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA* 276 (1998). In 1999, a \$12 million settlement was reached in a class action racial discrimination lawsuit brought by African-Americans against United Parcel Service. See Lieff, Cabraser, Heimann & Bernstein, LLP, *Employment Discrimination Lawsuits*, at http://lieffcabraser.com/practice_employment_rd.htm (last visited Jan. 12, 2004).

41. Voting numbers are from National Coalition on Black Civic Participation, <http://www.bigvote.org/stats.htm> (citing Voter News Service (N.Y. TIMES, Dec. 11, 2000), Compiled by: David A. Bositis, Ph.D., JCPES).

42. Jeff Pearlman, *At Full Blast*, SPORTS ILLUSTRATED, Dec. 27, 1999, at 60 (profes-

The Supreme Court's opinions in *Grutter and Gratz* could be viewed as being consistent with the dream of the Individualist Dreamer. The Individualist Dreamer is always going to be concerned when government treats people as members of racial and ethnic groups, even for such laudable purposes as promoting integrated education. To do so means that government is infringing upon the individuality of citizens. The only way such an infringement of individuality could be justified, in the dream of the Individualist Dreamer, is by creating more capacity for individual self-determination than what is lost by treating people as members of racial and ethnic groups. As Justice Blackmun stated so well for the Individualist Dreamer in *Regents of California v. Bakke*, "sometimes to get beyond race you have to take account of race."⁴³ For Individualist Dreamers to agree with O'Connor's opinion, they would place special emphasis on O'Connor noting that the need for a critical mass of underrepresented minorities is not premised on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. The experience of being a minority in a society like ours, where race still unfortunately matters, is like that of growing up in a particular region or having particular professional experience that is likely to affect an individual's views. Thus, taking account of race and ethnicity is being done on the basis of respecting, not contradicting individuality. And as O'Connor also points out, the admission policy helps to break down racial stereotypes, not reinforce them.

sional baseball player John Rocker commented: "'Imagine having to take the [Number] 7 train to the ballpark, looking like you're [riding through] Beirut next to some kid with purple hair next to some queer with AIDS right next some dude who just got out of jail for the fourth time right next to some 20-year-old mom with four kids. It's depressing. . . . The biggest thing I don't like about New York are the foreigners. I'm not a very big fan of foreigners.'" In the article, Rocker "calls an overweight black teammate 'a fat monkey,'" and says "'I'm not a racist or prejudiced person, . . . but certain people bother me'"); Sarah Ballard, *An Oddsmaker's Odd Views*, SPORTS ILLUSTRATED, Jan. 25, 1988, at 7 (quoting Jimmy "The Greek" Snyder saying "that blacks have 'been bred' to be better athletes than whites. . . . 'This goes all the way to the Civil War, when . . . the slave owner would breed his big woman so that he would have a big black kid'"); Associated Press, *Fuzzy Apologizes for Tiger Comments*, GOLFWEB NEWS, Apr. 21, 1997 at <http://services.golfweb.com/news/zoeller970421.html> (quoting golfer Fuzzy Zoeller commenting on Tiger Woods after Tiger's Masters win (the winner of the Masters chooses the menu for the Champion's Dinner the following year) "You pat him [Woods] on the back and say congratulations and enjoy it and tell him not to serve fried chicken . . . or collard greens or whatever the hell they serve").

43. See *Regents of the Univ. of Cal v. Bakke*, 438 U.S. 265, 407 (Blackmun, J., concurring) (1978).

B. NATIONALIST DREAM

For the Nationalist Dreamer, much has also been accomplished in America over the past 40 years. For the Nationalist Dreamer, desegregation was about making America a stronger and better nation. Making America not just better off in a material sense, but also in a societal sense, to create a more just and fair society committed to its basic values of liberty, freedom and democracy, which are applied to all. The opening up of American society has clearly strengthened this country. Desegregation advanced the commitment of American society to social justice. America's fundamental values of liberty, equality and democracy no longer stand in sharp contrast to the discriminatory treatment of blacks. Desegregation has helped to bleach out a portion of the stain on the American soul derived from the racism inflicted upon black people. In addition, America is the Shining City on the Hill. It has demonstrated the superiority of its values over those of its major international competitor during the Desegregation Era, the Soviet Union. American now stands as the only unquestioned superpower remaining in the world. America also leads the world in terms of economic productivity. American culture is spreading throughout the world, convincing people in other countries to adopt democracy, individual liberty and freedom.

O'Connor's opinion in *Grutter* could also be viewed as consistent with the dream of the Nationalist Dreamer—to build a stronger and better America. The Nationalist Dreamer would pay particular opinion to O'Connor pointing to the benefits, to all Americans, that flow from taking account of race and ethnicity in the admissions process of selective colleges, universities and graduate programs. As O'Connor notes, such diversity not only improves the educational process of all, but it advances the interest of American society in a number of other ways. It helps to increase America's competitive advantage in a world where business is increasingly international and needs people trained in appreciating different cultures in order to be successful. Affirmative action helps to assist the military create an effective fighting force to defend the national security. Affirmative action also helps to cultivate a set of leaders with legitimacy in the eyes of the citizenry, because it keeps the path to leadership visibly open to talented and qualified individuals of every race and ethnicity.

C. AFROCENTRIC DREAM

For the Afrocentric Dreamer, much progress has been made by blacks as a group and individual blacks over the past forty years. Yet, this success should not obscure the reality that blacks still trail non-Hispanic whites in virtually every measure of socio-economic well being. In January 1999, there were almost 9,000 African-American elected officials, including 450 mayors of major U.S. cities.⁴⁴ Even though there were 37 blacks elected to the House of Representatives,⁴⁵ constituting nearly 8.5% of the members of the lower house of Congress, there were no black Senators or Governors from any of the fifty states of the Nation. When adjusted for inflation, the per capita income of African-Americans increased by 250% from 1967 to 2000.⁴⁶ Yet, this increase has still left blacks earning only 65% of that of non-Hispanic white per capita income in 2000.⁴⁷ According to the U.S. Census Bureau, in 1966, 40.9% of the black population,⁴⁸ 50.6% of children under the age of 18 and 55.1% of those over the age of 65 lived below the poverty line.⁴⁹ In 2001, these percentages decreased to 22.7%,⁵⁰ 30.2% and 21.9%, respectively.⁵¹ But, for non-Hispanic white Americans, the corresponding figures were 7.8%,⁵² 9.5% and 8.1%,⁵³ respectively. The percentage of blacks age 18-24 enrolled in higher education increased from 13% in 1967 to 31.3% in 2001.⁵⁴ However, the percentage of non-Hispanic whites enrolled in college increased over the same period from 26.9% to

44. See Joint Center for Political and Economic Studies, *Number of Black Elected Officials in the United States, by State and Offices available at* http://www.jointcenter.org/DB/table/graphs/BEO_00.pdf.

45. 2002 Statistical Abstract 247, tbl. 382: Members of Congress-Selected Characteristics 1983-2002, <http://www.census.gov/prod/2003pubs/02statab/election.pdf> (the number reported is 39, but that includes District of Columbia and Virgin Islands delegates).

46. U.S. Census Bureau, Historical Incomes Tables, tbl. P-1b, <http://www.census.gov/hhes/income/histinc/p01b.html> (historical income table for African-Americans).

47. U.S. Census Bureau, Historical Incomes Tables, tbl. P-1a, <http://www.census.gov/hhes/income/histinc/p01a.html> (historical income table for African-Americans).

48. U.S. Census Bureau Historical Poverty Tables, tbl. 2, <http://www.census.gov/income/histpov/hstpov02.lst>.

49. U.S. Census Bureau Historical Poverty Tables, tbl. 3, <http://www.census.gov/hhes/poverty/histpov/hstpov03.html> (contains statistics for those under the age of 18 and over the age of 65).

50. U.S. Census Bureau Historical Poverty Tables: 2001, *supra* tbl. 2.

51. U.S. Census Bureau Historical Poverty Tables: 2001, *supra* tbl. 3.

52. U.S. Census Bureau Historical Poverty Tables: 2001, *supra* tbl. 2.

53. U.S. Census Bureau Historical Poverty Tables: 2001, *supra* tbl. 3.

54. National Center for Educational Statistics, DIGEST OF EDUCATION STATISTICS 2002, 225 tbl. 186: Enrollment rates 18-24 year olds in degree granting institutions by sex, race/ethnicity: 1967-2001, <http://nces.ed.gov/pubs2003/2003060c.pdf>.

39.3%.⁵⁵ The college completion rate for blacks over the age of 25 increased from 4.5% in 1970 to 16.5% in 2000.⁵⁶ But the non-Hispanic white completion rate increased from 11.6% to 28.1%.⁵⁷ In 1965, barely 1% of all law students were black and 2% of all medical students were black.⁵⁸ In 1998, however, African-Americans constituted 4.3% of lawyers and judges, 4.9% of physicians, 4.1% of engineers and 5.8% of college and university teachers.⁵⁹ As impressive as the increase in these percentages is, because one out of every eight Americans is black, these percentages are considerably less than what would be necessary to reach proportionate representation. The life expectancy of black males increased by over eight years from 1970 to 2000 and that of black females by nearly seven years.⁶⁰ Yet, the figures from 2000 still have black males living six and half years less than non-Hispanic white males (68.3 and 74.8) and black females living five years less than non-Hispanic white females (75.0 and 80.0).⁶¹

The Afrocentric Dreamer is much more likely to view the Court's decision to uphold the Law School's admission plan favorably, but reject the reasons Justice O'Connor articulated. By allowing selective colleges and universities to continue to use race and ethnicity in their admissions process, the doors of opportunity in American society will remain open to African-Americans. While affirmative action alone will not eliminate racial oppression completely, eliminating affirmative action would certainly have been a devastating blow to blacks and other minorities who wanted to gain admissions to prestigious higher education degrees.

55. *Id.*

56. LOUISE L. HORNOR, BLACK AMERICANS: A STATISTICAL SOURCEBOOK 114 (2000 cd.) (contains the figures for 1967); U.S. Census Bureau, Current Population Survey, March 2000: Racial Statistics Population Division, www.census.gov/population/socdemo/race/black/ppl-142/tab07.txt (contains the figures for 2000).

57. LOUISE L. HORNOR, BLACK AMERICANS: A STATISTICAL SOURCEBOOK, *supra* note 56, at 114 (contains the figures for 1970); U.S. Census Bureau, Current Population Survey, March 2000, *supra* note 56 (contains the figures for 2000).

58. WILLIAM BOWEN AND DERRICK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 5 (1998).

59. HORNOR, *supra* note 56, at 202.

60. *Expectation of life by age, race, and sex*, 49 NATIONAL VITAL STATISTICS REPORT 12, 24 tbl. 6 (2001).

61. HORNOR, *supra* note 56, at 53 (contains the figures for 2000); *Expectation of life by age, race, and sex*, *supra* note 60, at 24.